Ohio Legislative Service Commission

Final Analysis

Sam Benham

Am. Sub. H.B. 510

129th General Assembly
(As Passed by the General Assembly)

Reps. Amstutz, R. Adams, Beck, Blair, Blessing, Boose, Bubp, Hackett, Henne, Hottinger, Huffman, McClain, Ruhl, Sprague, Stebelton, Uecker, Wachtmann, Batchelder

Sens. Bacon, Schaffer, Beagle, Coley, Eklund, Faber, Niehaus, Seitz

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ACT SUMMARY

New Financial Institutions Tax

- Replaces the previously existing taxes on financial institutions with a new business-privilege tax on financial institutions, beginning with tax year 2014.

- Eliminates the previously existing dealers in intangibles tax and imposes the existing commercial activities tax on dealers in intangibles except dealers that are "small dollar lenders" or affiliates of financial institutions; small dollar lenders and most dealers affiliated with financial institutions become subject to the new tax.

- Exempts a financial institution's noncontrolling minority interests in other companies from the financial institution tax base unless the interest is in a bank or bank holding company subject to the tax.

- Imposes the financial institutions tax on the basis of the total equity capital in proportion to the taxpayer's gross receipts sitused in Ohio, with situs based on either where a taxpayer's customers are deemed to benefit from the taxpayer's services or, in the case of some receipts, where the taxpayer's regular places of business are located.

- Sets the initial tax rate at 0.8% on the first $200 million in apportioned total equity capital, 0.4% for each dollar of apportioned equity capital greater than $200 million and less than or equal to $1.3 billion, and 0.25% on apportioned total equity capital in excess of $1.3 billion, subject to adjustment after the first and third year if the revenue generated by those rates exceeds or falls below 10% of the "target" revenue of $200 million for 2014 or 1.06% of any adjusted amount for 2016.

- Sets the minimum annual tax at $1,000.

- Requires financial institutions to report and pay the tax on a consolidated basis with related companies (both bank and nonbank), with the consolidation based generally on which entities are included in regulatory reports to federal authorities; liability for the tax is joint and several among the institutions included in a consolidated reporting group.

- Permits a financial institution taxpayer group that owns shares of a publicly traded real estate investment trust to phase in the value of its interest in the REIT into the group's tax base over five years.

- Permits taxpayers subject to the new tax to claim the following tax credits if the taxpayer otherwise qualifies: job creation, job retention, venture capital loan loss, historic building rehabilitation, New Markets, research and development, and motion picture production tax credits, and the credit for regulatory assessments paid to the Department of Commerce's Division of Financial Institutions and for qualifying (i.e., affiliated) dealers in intangibles.

- Provides for how the tax is to be paid, reported, enforced, and administered.

- Provides a refundable personal income tax credit to individuals, estates, and trusts that own a pass-through interest in a financial institution that pays the Financial Institutions Tax to offset their pass-through share of that tax.

- Excludes from the financial institution tax, and thereby subjects to the commercial activity tax, "grandfathered unitary" and "diversified" savings and loan holding companies and such companies' affiliates that are not banking organizations.

- Authorizes businesses subject to the CAT to claim the motion picture production tax credit against that tax.

- Allows certain holding companies' affiliates that are recipients of a Job Retention Tax Credit to claim the credit against any other allowable taxes in a sequential order despite any agreement or terms to the contrary, and allows affiliated companies to claim the credit against any such taxes.

- Prohibits the Commissioner from assessing affiliates of an insurance company for unpaid commercial activities tax before 2013, provided one of the company's corporate affiliates paid the corporation franchise tax.

Real property valuation

- Accelerates the application of the provisions of H.B. 487 that revised how real property is to be appraised for property tax purposes.

- Requires county auditors, when valuing real property for property tax purposes, to account for the effects of the exercise of police powers and other governmental actions affecting property.

Commercial Real Estate Broker Liens

- Provides for liens to attach to commercial real estate in favor of the broker when the broker is engaged to purchase real estate, and specifies how the lien amount is to be determined (prior law expressly providing such liens only for brokers engaged in selling or leasing such property).

- Specifically provides for how the amount of a commercial real estate broker lien is to be determined when the broker is engaged to lease the property for the property owner.

- Extends the deadline for recording commercial real estate broker liens to 90 days after there is a default in the payment of the broker's commission and extends the time for enforcing the lien from one year to two years after recording.

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CONTENT AND OPERATION

Financial institutions tax

Overview

The act enacts a new tax for many of the companies previously subject to the corporation franchise tax (primarily banks and other corporations classified as financial institutions) and generally subjects "dealers in intangibles" (for example, mortgage brokers, stockbrokers, finance and loan companies that are not classified as financial institutions) to the commercial activities tax (CAT) unless they are affiliated with other financial institutions or are classified as "small dollar lenders." The new tax would first apply to tax year 2014.

All revenue from the new financial institution tax (FIT) is to be credited to the General Revenue Fund.[1]

In effect, the FIT replaces the corporation franchise tax[2] and the dealers in intangibles tax.[3] The corporation franchise tax had been and will continue to be imposed until 2014 on financial institutions, bank holding companies, financial holding companies, savings and loan holding companies, affiliates of any of those if the affiliate is majority-owned or -controlled by any of the foregoing (directly or indirectly) and if the affiliate is engaged in a business considered by the Federal Reserve Board to be financial in nature or incidental thereto. The franchise tax also applies to any company that solely facilitates or services securitizations (i.e., transfers of assets to a third person that issues securities backed by the right to receive payment from the asset – for example, selling loans to a person that packages loans into securities offered in a secondary market). The franchise tax is levied on the basis of net worth (capital, surplus, undivided profits, and reserves apportioned on the basis of various business presence factors, and excluding, among other items, goodwill, appreciation, and abandoned property). The rate of the tax is 1.3%. All the revenue from the franchise tax is credited to the General Revenue Fund.

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[1] The new tax's revenue would not affect continuing law's distribution of state tax revenue to the Local Government Fund or the Public Library Fund. Under continuing law (R.C. 131.51), the amount of money to be credited to each of those funds after FY 2013 is fixed at the proportion of tax revenue credited to each fund in FY 2013. But the new tax will not produce revenue until after FY 2013.

[2] R.C. Chapter 5733.

[3] R.C. 5707.03 and 5725.13 through 5725.17.

The dealers in intangibles tax had been and will continue to be levied until 2014 on the basis of a dealer's shares and capital at a rate of 0.8%. Revenue from the tax is credited to the General Revenue Fund.

The act terminates both the corporation franchise tax and the dealers in intangibles tax at the end of 2013.

Taxpayers

The FIT is imposed on "financial institutions" organized for profit and doing business in Ohio "or otherwise having nexus in or with this state under the Constitution of the United States." Financial institutions are defined for the purposes of the tax to include the following:

(1) Bank organizations, which are defined to include the same classes of institutions previously subject to the corporation franchise tax;

(2) Holding companies of bank organizations, except for diversified savings and loan holding companies and unitary grandfathered savings and loan holding companies (see "**Exclusion of certain holding companies**"); and

(3) Nonbank financial organizations, which are defined to include persons, other than bank organizations or holding companies, that are engaged in business primarily as "small dollar lenders."

"Small dollar lenders"

A person engages in business primarily as a "small dollar lender" if the person's business primarily involves providing individuals with loans that do not exceed $5,000 or that have terms longer than 12 months and if, during a taxable year, the person's gross income from providing such loans exceeds the person's gross income from all other activities combined.

"Captive finance" companies

The act specifies that a "captive finance company" is not a nonbank financial organization subject to the new tax. A captive finance company is an entity that derived at least 75% of its gross income for the current taxable year and the two preceding taxable years from any one or more of the following: (1) financing transactions with or for members of the company's affiliated group or an affiliated group member's customers, distributors, franchisees, or manufacturing-related suppliers, (2) issuing bonds or other publicly traded instruments for the benefit of the affiliated group, or (3) making short- or long-term investments with the affiliated group's cash reserves for the benefit of the affiliated group. An "affiliated group" is generally a group of entities under common ownership of 50% or more, and their common owners. "Financing transactions" include making or selling loans, extending credit, and leasing, among other things specified in the act. For example, an affiliate of an automobile or equipment manufacturer that exists to extend credit to dealers or purchasers of the manufacturer's products is a captive finance company. Because captive finance companies are not subject to the FIT and the value of their Ohio equity capital is not included in the FIT tax base of their affiliated group financial institutions, captive finance companies are subject to the commercial activity tax by default, since the CAT applies if the FIT does not.

Securitization companies

The act also specifies that "nonbank financial organization" excludes any person that facilitates or services securitizations for a bank organization (or a holding company thereof), a captive finance company, or a member of the person's affiliated group. For this purpose, a securitization is transferring an asset to another party and subsequently issuing securities that are backed by the right to receive payment from the transferred asset. Accordingly, such a person is subject to the commercial activity tax by default.

"Grandfathered unitary" S & L subsidiaries

If a bank organization is owned directly by a grandfathered unitary savings and loan company, the financial institution that is subject to the FIT consists only of the bank organization and other entities, if any, that are included in the bank organization's call report.

Dealers in intangibles

Under the act, if a dealer in intangibles is not a small dollar lender, the dealer is subject to the CAT unless the dealer is affiliated with a financial institution in such a way that it is included. A dealer affiliate is subject to the FIT as part of its parent financial institution's reporting group.

Exempted organizations

Credit unions, insurance companies, and institutions organized under the Federal Farm Loan Act (or a successor) are not bank organizations or nonbank financial organizations subject to the new tax (and were not subject to the franchise tax).[4]

[4] R.C. 5726.01.

Organizations that do not qualify as financial institutions under the act are subject to the commercial activity tax (unless specifically exempted from that tax).[5]

Tax base

The financial institutions tax is levied on the "total Ohio equity capital" of financial institutions. Under the act, a financial institution's total equity capital includes all of its equity components, including common stock, perpetual preferred stock, surplus, retained earnings, treasury stock, unearned employee stock ownership plan shares, and accumulated other comprehensive income. It excludes the equity of any noncontrolling minority interests in consolidated subsidiaries unless the minority interest is a bank organization or bank holding company subject to the FIT.

"Total Ohio equity capital" is the portion of the financial institution's total equity capital that is apportioned to Ohio under the act. The apportionment is based on the proportion of the taxpayer's gross receipts (generally, its total income without deduction for expenses) that can be apportioned to Ohio. The apportionment factor is a fraction, the numerator of which is the total gross receipts of a financial institution in Ohio during the taxable year and denominator of which is the total gross receipts of the financial institution everywhere during the taxable year. Specifically, gross receipts are apportioned to Ohio in proportion to the benefit from services that the taxpayer's customers receive in this state as compared to the benefit from services that all of the taxpayer's customers receive everywhere. The Tax Commissioner must adopt administrative rules to provide additional guidance. The physical location where a customer ultimately receives the benefit is deemed "paramount" in determining where the proportion of benefit is received.[6] The act provides several illustrations of how specified types of receipts, including receipts from loans, credit cards, and leases, are to be apportioned to Ohio. Receipts from a financial institution's investment and trading assets and activities, including interest and dividends, are sitused to Ohio in proportion to the institution's Ohio customer base. The extent to which an institution's customer base in Ohio may be determined similarly to the general apportionment of gross receipts (i.e., according to the benefit customers receive within the state) or according to an alternative formula that considers the proportion of the value of receipts from such assets and activities that can be assigned to one of the taxpayer's regular places of business within the state.

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[5] R.C. 5711.22, 5751.01, 5751.011, and 5751.012.

[6] This situsing method is substantially the same as the one prescribed for most services under the commercial activity tax. See R.C. 5751.033(I).

A financial institution, for the purpose of calculating the apportionment factor, is required to use the institution's method of accounting for income tax purposes, and if the institution's method of accounting for income tax purposes changes, then the institution must change accordingly its method of accounting for the apportionment factor.

The Tax Commissioner, with or without the request of a taxpayer, may apply an alternative situsing method to the taxpayer if the statutory method does not fairly represent the extent of taxpayer's business activity in Ohio.[7]

Phase-in for investments in Ohio-qualified real estate investment trusts

The act provides a temporary reduction from a financial institution's total equity capital for the institution's investment in an "Ohio-qualified real estate investment trust." A real estate investment trust is "Ohio-qualified" if it is, and was on January 1, 2012, traded on a public stock exchange.

When computing its total equity capital for tax year 2014, a financial institution may deduct 80% of the amount that was invested in such a trust on January 1, 2012. Then, for tax years 2015, 2016, and 2017, the financial institution may deduct 60%, 40%, and 20% of that amount, respectively. After tax year 2017, no deduction is allowed. For purposes of calculating the financial institution's apportionment factor for tax years 2014 through 2017, the act requires a similar phase-in for the institution's gross receipts from such trusts.[8]

Tax rate

The FIT tax rate is three-tiered: a rate of 0.8% applies to the first $200 million of a taxpayer's total Ohio equity capital, a rate of 0.4% applies to the amount of total equity capital greater than $200 million and less than or equal to $1.3 billion, and a rate of 0.25% applies to the amount of total Ohio equity capital in excess of $1.3 billion. If, based on these rates, a taxpayer's liability does not exceed $1,000, the taxpayer must instead pay a minimum tax of $1,000.

The act provides for a rate adjustment mechanism that applies if revenue from the new tax for the 2014 tax year is more than 110% or less than 90% of a target revenue amount of $200 million for 2014 or, for 2016, more than 110% or less than 90% of $212 million (or 1.06% of any amount adjusted from 2014). If, in 2014, revenue exceeds 110% of the target revenue amount (i.e., is more than $220 million), the Tax Commissioner

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[7] R.C. 5701.12, 5726.01(K),(S), and (T), 5726.04, and 5726.05.

[8] R.C. 5726.041.

must decrease the tax rates by an equal percentage across all three tiers for 2015 and subsequent years to the extent that the rates generated revenue above the target amount. If the 2014 rates generate less than 90% of the target amount (i.e., less than $180 million), only the 0.25% third-tier rate for equity capital in excess of $1.3 billion would be adjusted upward for tax year 2015 and thereafter. The rate would be increased by a percentage equal to the difference between (1) the percentage by which the $200 million target exceeded the actual revenue and (2) 10% of the $200 million target. For example, if actual 2014 revenue were $170 million, the $30 million shortfall is 15% of the target, so the third-tier tax rate (0.25%) would be increased by 5% (15% - 10%), yielding a new third-tier rate of 0.2625%. The same adjustment mechanism is to occur during tax year 2016, with the same consequences for year 2017 and thereafter if the revenue deviated from the 2016 target amount of $212 million or 1.06% of any amount adjusted from 2014.[9]

Tax reporting

Each financial institution subject to the FIT must file an annual report by October 15 of the tax year. If two or more financial institutions are related by ownership or control in such a way that they are required to be included in the same report to federal regulatory authorities (for instance, the Federal Reserve Board), they must file the annual report and pay the tax as a consolidated group composed of all such institutions.[10] For this purpose, the federal reports are the FR-Y9 that holding companies must file with the Federal Reserve Board (and related versions of that form) and the "call report" (or consolidated reports of condition and income) that certain kinds of financial institutions must file with their respective regulatory agencies and as prescribed by the Federal Financial Institutions Examination Council. Both reports are filed on a consolidated basis. If an institution is included in both an FR-Y9 and a call report, that institution must be included in the annual report with the group for which the FR-Y9 is filed and excluded from the group for which the call report is filed.

The member of any consolidated group that is required to file the annual report on behalf of the whole group is the "reporting person." In the case of FR-Y9 filers, the reporting person is the top-tier holding company required to file the FR-Y9. In the case of call report filers, the entity required to file the call report is the reporting person if a

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[9] R.C. 5726.04.

[10] Under the FIT, all members of such a group would collectively be a "financial institution" and a taxpayer, so references to a financial institution or a taxpayer usually refer to the group, not individual institutions.

financial institution is not a member of a consolidated group, the financial institution is the reporting person.[11]

Tax payments

The act requires taxpayers to make estimated payments on or before January 31, March 31, and May 31 of a tax year. The January payment must equal either the minimum $1,000 tax or one-third of the estimated annual tax, whichever is greater. The March payment must equal one-half of the remaining balance of the estimated annual tax after subtracting the amount of the January payment. The remaining May payment must equal the other remaining one-half. Any final tax payment is due with the taxpayer's annual report on or before October 15.

The amount of estimated tax is based on the amount of the taxpayer's "qualifying net tax" for the current or preceding tax year. In general, a taxpayer's estimated tax is the lesser of 100% of the taxpayer qualifying net tax for the preceding tax year or 90% of the qualifying net tax due for the current year. Qualifying net tax is the lesser of (1) the tax imposed for the tax year minus any credits or (2) the amount of tax shown on the annual report minus credits. If the taxpayer fails to file a report or files a report in bad faith, the qualifying net tax is the tax imposed for a tax year minus credits.[12]

The Tax Commissioner may require each taxpayer to file each annual or estimated tax report electronically using the Ohio Business Gateway or other electronic means. In addition, tax payments must be remitted electronically, but a taxpayer may apply to the Commissioner to be excused from the electronic payment requirement for good cause.[13]

Tax credits

The act authorizes the following tax credits to be claimed by taxpayers subject to the FIT if the taxpayer otherwise qualifies for the credit under the specific terms of the credit as provided in the sections and chapters noted: job creation,[14] job retention,[15] venture capital loan loss,[16] historic building rehabilitation,[17] New Markets,[18] motion

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[11] R.C. 5726.04.

[12] R.C. 5726.03 and 5726.06.

[13] R.C. 5726.03.

[14] R.C. 122.17 and 5726.50.

[15] R.C. 122.171 and 5726.50.

[16] R.C. Chapter 150. and 5726.53.

picture production tax,[19] and research and development,[20] and the credit for regulatory assessments paid to the Department of Commerce's Division of Financial Institutions.[21]

The act authorizes, for tax year 2014, a nonrefundable credit against the FIT for a financial institution with a dealer in intangibles in its qualifying controlled group – that is, the group of entities grouped together for the purpose of paying the FIT. The amount of the credit equals the lesser of (1) the amount of dealers in intangibles tax the dealer paid in the preceding calendar year minus refunds or (2) the product of the financial institution's direct investment in stock of the dealer in the preceding year, the ratio of capital employed by the dealer in Ohio (as measured under the dealers in intangibles tax), and the current dealers in intangibles tax rate (0.8%).[22] The credit allows for the fact that these dealers in intangibles pay the dealers in intangibles tax in 2014 for the preceding year while paying the FIT in 2014 for tax year 2014.

The act allows the unused portion of the following nonrefundable credits that could have been claimed against the corporate franchise or dealers in intangibles tax before those taxes are eliminated in 2014 to be carried forward and claimed against the FIT:

- Job Retention Tax Credit.
- Credit for regulatory assessments paid to the Department of Commerce's Division of Financial Institutions.
- Historic Rehabilitation Tax Credit.
- New Markets Tax Credit.
- Research and Development Credit.[23]

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[17] R.C. 149.311 and 5726.52.

[18] R.C. 5725.33 and 5726.54.

[19] R.C. 122.85 and 5726.55.

[20] R.C. 5726.56.

[21] R.C. 5726.51.

[22] R.C. 5726.57.

[23] R.C. 5726.50, 5726.51, 5726.52, 5726.54, and 5726.56.

Administration and enforcement

The act includes provisions for the administration and enforcement of the new tax that are substantially the same as similar provisions under the corporation franchise tax, as follows, except as noted otherwise:

- Penalties for failure to report or pay the tax as required by law.[24]
- Interest on unpaid taxes, including on underpaid estimated taxes, and on refund payments.[25]
- Provisions for issuing assessments to collect unpaid tax, penalty, or interest, except the statute of limitations on issuing an assessment for the new tax is four years instead of three.[26]
- Provisions for obtaining refunds of tax overpayments, except the statute of limitations on applying for a refund of the new tax is four years instead of three.[27]
- Provisions for cancelling the authority of a noncompliant business to continue doing business in Ohio, including through a quo warranto action, and for reinstatement of such businesses.[28]
- Provisions for companies that discontinue doing business in Ohio to notify the Tax Commissioner.[29]

Exclusion of certain holding companies

The act excludes from the definition of financial institutions subject to the FIT "diversified savings and loan holding companies," according to the federal definition of those companies that existed on January 1, 2012, and "grandfathered unitary savings and loan holding companies" as defined by federal law as that law existed on December 31, 1999. If the top-tier holding company of the financial institution is either of these companies, a "reporting person" for the purpose of calculating and paying the FIT

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[24] R.C. 5726.03(C)(4) and 5726.21.

[25] R.C. 5726.07 and 5726.32.

[26] R.C. 5726.32.

[27] R.C. 5703.052, 5703.053, 5703.70, 5726.30, and 5726.31.

[28] R.C. 5726.40 through 5726.43.

[29] R.C. 5726.36.

(using FR Y-9s or call reports) is the holding company's subsidiary bank organization. In all other cases, the financial institution reporting person remains the top-tier holding company. Under federal law, it appears that both types of holding companies are limited to owning only one bank organization. The act effectively exempts direct affiliates of these holding companies that are not bank organizations from the FIT and subjects such affiliates to the CAT (unless they are specifically exempted under the CAT law).

Under federal banking law, a diversified savings and loan holding company is a savings and loan holding company whose subsidiary savings association and related financial activities represented less than 50% of its consolidated net worth at the close of its fiscal year and of its consolidated net earnings for such fiscal year, as determined under federal law.[30] A grandfathered unitary savings and loan holding company is a holding company that may hold only one savings and loan subsidiary institution and may continue (after 1999) to be engaged in a broad range of nonfinancial business activities unlimited by restrictions on nonfinancial business activities that, without the grandfathering, would apply under the Bank Holding Company Act of 1956.[31] Under the act, these holding companies are, by implication, subject to the CAT.[32]

Municipal taxing authority

The act specifies that municipal corporations may not levy a tax that is "the same as or similar to" the FIT.[33] Continuing law prohibits municipal corporations from levying most of the kinds of taxes the state currently levies (the income tax being the major exception). If there were no such prohibition, municipal corporations would be authorized to levy taxes under their home rule authority, without authorization from the General Assembly.[34]

State retirement system investment managers and agents

Former law required that, to qualify as an investment manager or agent for any of the state's five public employee retirement systems, a person must have been subject

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[30] 12 U.S.C. § 1467a.

[31] 12 U.S.C. § 1467a(c)(9)(C).

[32] R.C. 5726.01(F), (H), (J), and (U) and 5751.01(E)(3).

[33] R.C. 715.013.

[34] The doctrine of implied pre-emption was abandoned by the Ohio Supreme Court in 1998. Before then, if the state levied a certain kind of tax, municipal corporations were held to be impliedly pre-empted from levying the same kind of tax unless the General Assembly expressly authorized them to levy the tax.

to the dealers in intangibles tax, insurance company tax, the corporation franchise tax, or the personal income tax. The act adds the FIT and the CAT as qualifying taxes.[35]

Offsetting personal income tax credit

The act permits an individual, estate, or trust that owns a pass-through interest in a financial institution (for example, owns a membership share of a dealer in intangibles organized as a limited liability company) to claim a credit against the personal income tax that offsets the owner's share of the financial institution's FIT tax payments. The owner may claim a refundable credit equal to the owner's proportionate share of the lesser of the FIT due or paid in a taxable year.

For the purposes of determining the amount of the credit to which a taxpayer is entitled, the taxpayer must follow federal tax law principles governing the allocation of proportionate interests among partners of a partnership and beneficiaries of a trust.[36]

The act requires a person receiving such a credit to add the amount of the credit to its income for personal income tax purposes to the extent that the credit has been deducted in computing that income.[37]

Motion picture production credit

The act authorizes businesses subject to the CAT to claim the motion picture production credit that is available to persons subject to the personal income tax and that had been available to corporations regardless of whether a corporation is subject to the corporation franchise tax. The credit is a refundable credit equal to a percentage of Ohio production expenditures made by a motion picture production company. Previously, corporations that qualified for the credit could have claimed a "credit" against the corporation franchise tax, although nonfinancial corporations were not subject to the tax. In effect, nonfinancial corporations were not receiving a credit against a tax liability; they were receiving a direct payment from the General Revenue Fund. Under the act, they will apply the credit against their CAT liability.[38]

Job Retention Tax Credit transfer between related persons

The act allows any taxpayer that is an affiliate of a "diversified savings and loan holding company" (according to the federal law definition of those companies that

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[35] R.C. 145.114, 145.116, 742.114, 742.116, 3307.152, 3307.154, 3309.157, 3309.159, 5505.068, and 5505.0610.

[36] Internal Revenue Code Subtitle A, Subchapters J and K.

[37] R.C. 5747.01(A)(16) and (S)(11).

[38] R.C. 122.85 and 5751.54.

existed on January 1, 2012) or of a "grandfathered unitary savings and loan holding company" (according to the federal law definition on December 31, 1999) that holds a Job Retention Tax Credit certificate to elect to claim the credit against taxes other than those specified in a tax credit agreement with the Tax Credit Authority. In addition, any taxpayer related to the certificate holder is authorized to claim all or part of the remaining credit originally granted to the holder. To claim a credit, a related taxpayer must be part of the same affiliated group the taxpayer originally claiming the credit, meaning a group of entities related to one another through 50% or greater ownership interests either directly or through other indirect holding during any part of the taxable year for which the credit is claimed. However, the credit must first be claimed against the tax that the holder is subject to, and only then against the following taxes, in sequential order: the insurance premium taxes, the personal income tax, the CAT, and, finally, the FIT.

Credit recapture for nonperformance transfers to the taxpayer that actually claims the credit. The Tax Credit Authority, upon being notified by the Director of Development Services that the certificate holder did not maintain operations at the project site for the required amount of time, is authorized to require related persons to repay any claimed credits. The Tax Commissioner or Superintendent of Insurance may issue an assessment against a related person for that amount.[39]

Under prior law, only the taxpayer that has a job retention tax credit agreement with the state may claim the credit against the particular tax to which the taxpayer is subject.

Taxation of insurance company affiliates

The act prohibits the Tax Commissioner from assessing or holding liable for the failure to report or pay the CAT a corporation or any other person directly or indirectly owned by one or more insurance companies for any tax periods ending before January 1, 2013. To be eligible, the corporation, but not the other person or persons so owned by the insurance company or companies, must have reported and paid the corporation franchise tax but not the CAT for taxable periods before January 1, 2013.[40] The act also specifies that such a corporation or other person is subject to the CAT beginning on January 1, 2013.

[39] R.C. 122.171.

[40] Sections 4 and 5 of the act.

Real property valuation

The act accelerates the application of the provisions of Am. Sub. H.B. 487 of the 129th General Assembly affecting the valuation of real property and requires county auditors to account for the effects of the exercise of police powers and other governmental actions in determining the true value of real property.

Under continuing law, county auditors are responsible for valuing all real property in the county on a periodic basis to assign taxable values. The governing statutes and administrative rules direct county auditors to use the "best sources of information available" and to consider "all facts and circumstances relating to the value of the property, its availability for the purposes for which it is constructed or being used, its obsolete character, if any, the income capacity of the property, if any, and any other factor that tends to prove its true value."[41] Administrative rules prescribe certain approaches to estimate value, one of which is to use the value of comparable properties that have recently sold on the open market and to make adjustments to account for any differences.

Am. Sub. H.B. 487 of the 129th General Assembly authorized county auditors, in assessing real property that has recently sold, to consider factors other than the sale price. That act also specified that the value of all property was to be based on the fee simple estate, as if unencumbered by liens, easements, and other encumbrances. Under that act, these provisions do not apply until the first tax year, after tax year 2012, in which a county is required to conduct a sexennial reappraisal or a triennial update.[42]

Before the effective date of these provisions, if a particular property had recently been sold in an arm's length transaction, the value was required to be set at the sale price. If a parcel had "been the subject of an arm's length sale between a willing seller and a willing buyer within a reasonable length of time, either before or after the tax lien date [January 1], the auditor [was required to] consider the sale price of such . . . parcel to be the true value for taxation purposes" unless the parcel had since suffered some kind of casualty or an improvement had since been added.[43] Particular terms of a sale, such as financing terms or encumbrances on the property such as a lease, were to be disregarded if the property was recently sold in an arm's length transaction.[44]

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[41] R.C. 5713.03; R.C. 5715.01 (not in the act).

[42] Section 757.51 of Am. Sub. H.B. 487 of the 129th General Assembly.

[43] R.C. 5713.03.

[44] See *Cummins Property Services, L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516 (2008), and *Berea City Sch. Dist. V. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269 (2005).

The act repeals the uncodified section delaying the effective date of the provisions of Am. Sub. H.B. 487 of the 129th General Assembly affecting the valuation of real property. Accordingly, such provisions would take effect upon the effective date of H.B. 510.

The act also requires county auditors to consider the effects of the exercise of police powers and other governmental actions on the value of real property in the assessment process. Former law required county auditors to assess the property based on the true value of the fee simple state, as if unencumbered, without regard to such considerations.[45]

Commercial real estate broker liens

Under continuing law, a real estate broker that enters into a contract for services related to the sale, lease, or conveyance of commercial real estate acquires a lien on that property. The act adds that a real estate broker may also acquire such a lien when entering into a contract for services related to the purchase of commercial real estate.

Lien amount

Continuing law provides that the broker's lien may equal the amount due to the broker under the contract. Under former law, if that amount is payable in installments, the lien is limited to the amount due to the broker before or at the time of conveyance. The act specifies that this rule continues to apply when the broker's lien is for services related to a sale or conveyance. However, if the lien is for services related to a lease, the lien may equal the total amount of installment payments due under the contract, after subtracting any installments the lessor paid before default. Or, if the lien is for services related to a purchase, the amount of the lien may equal the total amount of installment payments due under the contract after subtracting any installments the owner paid before the lien was filed.

Recording a lien

Under former law, a broker must have recorded a commercial real estate lien affidavit based on the conveyance of property before the conveyance occurred. If the lien affidavit was based on the lease of property, it must have been recorded within 30 days after the first rental payment was due or, if the owner appropriately notified the broker at least ten days before the lease signing, before the lease was signed.

The act instead requires that a lien affidavit based on a lease must be recorded within 90 days after the owner defaults on a payment due under the broker's contract.

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[45] R.C. 5713.03.

Initial leases, lease renewals, or expansions of the leased space constitute separate leases for the purposes of determining the deadline. The act also adds that a lien affidavit based on the purchase of property must be recorded within 90 days after the conveyance of the property.

Lien enforcement

Former law provided that a broker could enforce a lien by filing a complaint with the Court of Common Pleas within one year after the lien affidavit was recorded. The act extends this time limit to two years.[46]

Tax levy

Although the new FIT is not imposed until 2014, the act defines a tax levy within the meaning of Article II, Section 1d, of the Ohio Constitution and therefore the provisions of law take effect immediately when it becomes law.[47]

HISTORY

ACTION	DATE
Introduced	04-12-12
Reported, H. Ways & Means	05-16-12
Passed House (75-23)	05-16-12
Reported, S. Ways & Means & Economic Development	12-05-12
Passed Senate (25-8)	12-05-12
House concurred in Senate amendments (77-16)	12-11-12

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[46] R.C. 1311.85, 1311.86, 1311.87, and 1311.88.

[47] A recent Ohio Supreme Court decision appears to signal the possibility that the sections of the act that do not levy taxes do not go into immediate effect but instead become effective on the ninety-first day after the governor files the act with the Secretary of State. See *State ex rel. Ohioans for Fair Dists. v. Husted*, 130 Ohio St.3d 240 (2011).